NO. 96344-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner/Cross-Respondent,

v.

MICHAEL BIENHOFF AND KARL PIERCE,

Respondents/Cross-Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER/CROSS-RESPONDENT

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2. Whether the trial court abused its discretion in concluding that the prosecutor's questions during voir dire were proper, and denying the defendants' motion for a mistrial.

3. Whether this Court's decision in State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001), is incorrect and harmful.

4. Whether the trial court properly allowed a peremptory challenge to Juror 6 where she repeatedly exhibited discomfort with being a juror in a murder case and expressed doubt about her ability to serve.

5. Whether Pierce's claims regarding deliberations can be raised for the first time on appeal where they are not supported by the record and are not manifest constitutional error.

B. STATEMENT OF THE CASE

Michael Bienhoff and Karl Pierce were found guilty by a jury of felony murder in the first degree based on attempted robbery in the first degree. RP 3939-40. The victim, Precious Reed, had agreed to meet Bienhoff in a parking lot at Woodland Park because Bienhoff claimed to have a large amount of marijuana to sell. RP 1614-16, 3428, 3434, 3440. Reed was killed in the parking lot by a single gunshot wound while he and Bienhoff were seated in the front seat of Reed's van. RP 1132, 1636-41, 3039-48, 3452-55.[1] The State presented evidence that Bienhoff had

[1] Most, but not all of the volumes of the verbatim report of proceedings are consecutively paginated. The consecutively paginated volumes of the verbatim proceedings will be

tricked Reed into believing that he had marijuana to sell, and was attempting to rob Reed at gunpoint when Reed was shot. RP 1868, 2153-54, 2597, 3771. The defense theory was that Reed was trying to rob Bienhoff and was killed during a struggle over his own gun. RP 3452-56, 3822, 3823.

Scott Barnes testified that he picked up Ray Lyons, Bienhoff and Pierce and drove them to Woodland Park at Bienhoff's request. RP 2104-21. Bienhoff directed him to park in a lot away from and out of view of the parking lot where Bienhoff planned to meet Reed. RP 2115-21. Bienhoff and Pierce were armed with guns that Lyons had provided, and Barnes suspected they intended to commit robbery. RP 2123-26, 2540-55, 3218. As Barnes waited in his car, he heard gunshots and then Lyons, Bienhoff and Pierce ran back to the car. RP 2130-33.

Police officers responded to the scene within minutes of the shooting and found Reed face down on the ground next to his van. RP 1129-33, 1226. Reed had $1200 in cash on his person. RP 1142; RP (10/6/15) 122. Police found no gun at the scene. RP 1189, 1275, 1320; RP (10/6/15) 175.

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referred to as RP. The separately paginated volumes of the verbatim proceedings will be referred to by the date of the proceeding, e.g., RP (10/7/15) at 190.

Bienhoff testified and admitted that he was present when Reed was shot, but claimed that he and Reed struggled over a gun that Reed pulled during the marijuana transaction. RP 3452-56. He denied having a gun. RP 3435, 3444, 3467. Pierce testified as well, and admitted that he was with Bienhoff at Woodland Park and was armed, but claimed he had no knowledge of any plan to rob Reed. RP 3233-56.

C. ARGUMENT

1. THE PROSECUTOR'S INQUIRY AS TO WHETHER THE POTENTIAL JURORS COULD DISREGARD PUNISHMENT WAS ENTIRELY PROPER.

Bienhoff and Pierce contend that the prosecutor improperly incited a discussion of the death penalty during voir dire. However, the record reflects that the prosecutor properly questioned the potential jurors about their ability to follow the court's instruction that "you may not consider the fact that punishment will follow." Pierce CP 131. Because this Court has directed that jurors who cannot disregard punishment should be screened out during voir dire, the prosecutor's questions in voir dire were proper, not misconduct. To the extent that the difficulty in voir dire arose from this Court's holding in State v. Townsend, which prohibits trial courts from informing potential jurors that a murder case does not involve the death penalty, the State agrees with Pierce that Townsend should be overruled.

a. The Discussion Of The Death Penalty Was Started By Jurors After The Prosecutor Questioned Them About Their Ability To Put Consideration Of Punishment Aside.

On the third day of jury selection, one juror was dismissed before lunch after expressing his reluctance to make any decision that would result in significant incarceration. RP 798-801. After lunch, as the State began its next round of voir dire, the prosecutor referred back to that juror's concerns about the gravity of being a juror. RP 824. The prosecutor inquired about the jurors' ability to decide guilt without considering the resulting punishment. RP 825. The focus of this inquiry was whether the jurors could render a guilty verdict regardless of potentially lengthy punishment. RP 825. The State specifically inquired whether the murder charge caused any of the jurors concern. RP 825. At that point, one juror asked about the death penalty. RP 825-26.

The trial court told the jurors in response, "The Washington Supreme Court has said that I can't tell you whether a death sentence is involved or not." RP 825-26. Some of the jurors expressed concern about serving on a case involving the death penalty and other jurors expressed general confusion about the process. RP 826-38. After considerable discussion between the State and the prospective jurors with no objection, Bienhoff and Pierce requested a mistrial. RP 838, 844.

This was not a timely objection. Failure to raise a timely objection to the prosecutor's questioning during voir dire bars consideration on appeal. State v. Elmore, 139 Wn.2d 250, 277, 985 P.2d 289 (1999). The alleged misconduct occurred at RP 825. No objection was lodged until RP 833.

The trial court reminded the defense that the State had not mentioned the death penalty: "All that Mr. Yip did was ask them if they had a problem not being involved in the penalty." RP 839. The trial court concluded that the State's voir dire was proper and denied the motion for a mistrial. RP 846. The trial court noted that, in its experience, the question of the death penalty is often raised by jurors during voir dire in first degree murder cases.[2] RP 846. The trial court instructed the potential jurors that "I am not allowed to tell you whether this is a capital case." RP 887.

Eventually one juror, Juror 76, was excused for cause by the trial court because she stated she found jury service to be too stressful. RP 837-38. The court clarified that she was being dismissed because "she is emotionally unable to be a juror."[3] RP 858. Neither defendant objected when she was excused, as they both had argued she should be excused due

[2] The court observed, "I actually was amazed that we had gotten this far without anybody raising the death penalty . . . that's one of things that usually comes out of a juror's mouth." RP 846.

[3] The trial court noted that Juror 76 was upset before lunch and before the death penalty was raised. RP 837, 849.

to hardship. RP 856-58. Two other jurors who expressed concerns about the death penalty, but stated that they could follow the law, served on the jury: Jurors 15 and 20. RP 828-30, 1026.

b. The Trial Court Reasonably Concluded That The Prosecutor Did Not Commit Misconduct By Inquiring Whether The Potential Jurors Could Put Aside Considerations Of Punishment.

The prosecutor did not incite a discussion of the death penalty, and did not "death qualify" the jury. The focus of the prosecutor's inquiry was whether jurors could put aside considerations of punishment, which is an inquiry that this Court explicitly endorsed in State v. Townsend, 142 Wn.2d at 847. In Townsend, this Court held that defense counsel was deficient in allowing the jury to be informed that the case did not involve the death penalty. Id. at 847. This Court expressed concern that informing the jury that a case does not involve the death penalty would result in jurors being "less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Id. Nonetheless, this Court found that Townsend was not prejudiced.[4] Id. at 848.

[4] Subsequently in State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007), State v. Hicks, 163 Wn.2d 477, 488, 181 P.3d 831 (2008), and State v. Clark, 187 Wn.2d 641, 655, 389 P.3d 462 (2017), this Court found that informing the jury that those murder cases did not involve the death penalty was not prejudicial error because there was no indication that the jurors failed to take their duty seriously.

In this case, the prosecutor asked the jurors about their ability to *disregard* punishment. In holding that this inquiry was improper, the Court of Appeals stood Townsend on its head. Townsend does not say that the jurors' ability to disregard the possibility of punishment is a forbidden topic in voir dire. To the contrary, Townsend instructs that "Rather than giving jurors information about the penalty in a noncapital case, we believe that voir dire should be used to screen out jurors who would allow punishment to influence their determination of guilt or innocence." 142 Wn.2d at 846. How are such jurors to be "screened out," unless they are questioned about their ability to set aside concerns about the potential punishment? In this case, the prosecutor properly probed the potential jurors' ability to set aside considerations of punishment.

Neither the initial question nor the follow-up questions, prompting the jurors to discuss that concept, were improper simply because the prosecutor repeated the question. Effective voir dire requires the jurors to engage with the parties and one another in discussing their ability to follow the law. Parties routinely prompt the jurors to discuss their thoughts. Prompting them to discuss their ability to set aside considerations of punishment, as required by the jury instructions, is not misconduct. The prosecutor did not "incite" the jurors to discuss the death penalty. The prosecutor urged the jurors to consider and discuss their

ability to put considerations of punishment aside. This line of inquiry was entirely proper.

The trial court reasonably concluded that the questions were proper, and its conclusion is entitled to deference. RP 839. This Court has recognized that voir dire is conducted under the supervision of the trial court, and "a great deal must, of necessity, be left to its sound discretion." State v. Davis, 141 Wn.2d 798, 10 P.3d 977 (2000). The Court of Appeals not only misinterpreted the record, but it also failed to accord any deference to the trial court's determination.

c. Townsend Is Incorrect And Harmful.

This Court should reconsider its holding in Townsend. In this case, the parties and the trial court struggled to comply with the holding of Townsend. This case is emblematic of the fact that Townsend has created significant confusion in voir dire in murder cases.

Townsend is based on concerns that are either misplaced or exaggerated. Informing potential jurors that a murder case does not involve the death penalty is not, in fact, informing the jury of the punishment that will result. The punishment for murder in the first degree could be anything from a 20-year sentence to life in prison without parole. The jury that is informed that a case is not a death penalty case still does not know what the actual punishment will be. More importantly, there is

no reason to presume that jurors become inattentive as soon as they know execution is not a possible sentence.

The Townsend decision causes unnecessary confusion for the trial court and parties, who struggle, as here, with what the jury *can* be told, and creates unnecessary anxiety among potential jurors who have misgivings about the death penalty. In light of this Court's recent decision in State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018) (finding the current death penalty scheme unconstitutional), continued adherence to Townsend will cause even more confusion. Washington should join the other states that allow potential jurors to be informed that a murder case does not involve the death penalty. See State v. Mott, 187 Ariz. 536, 931 P.2d 1046 (1997); People v. Hyde, 166 Cal. App. 3d 463, 212 Cal. Rptr. 440 (Cal. Ct. App. 1985); Stewart v. State, 254 Ga. 233, 326 S.E.2d 763 (1985); Burgess v. State, 444 N.E.2d 1193 (Ind. 1983); State v. Wild, 266 Mont. 331, 880 P.2d 840 (1994).

2. THE TRIAL COURT DID NOT ERR BY ALLOWING THE STATE TO EXERCISE A PEREMPTORY CHALLENGE AGAINST JUROR 6 BECAUSE SHE REPEATEDLY EXPRESSED HER DISCOMFORT WITH CONVICTING A DEFENDANT WHO WAS FACING POSSIBLE LIFE IMPRISONMENT.

Pierce contends that the trial court erred in allowing the State to use a peremptory challenge against one of three African-American jurors.

Under the new GR 37 standard, an objective observer could not view the challenge to Juror 6 as being race-based in view of the totality of the circumstances, given her extreme discomfort with serving as a juror in a case involving the possibility of substantial incarceration.[5]

In Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the United States Supreme Court held that the Equal Protection Clause prohibits purposeful racial discrimination in jury selection. Recently, this Court adopted a new rule, GR 37, to supplant the Batson analysis. That rule does not apply to this case because jury selection occurred before adoption of the rule in 2018. State v. Jefferson, 192 Wn.2d 225, 249, 429 P.3d 467 (2018); RP 406.

Nonetheless, in State v. Jefferson, this Court modified the third step of the Batson analysis to be consistent with GR 37 and applied the modified test to Jefferson's trial, which occurred in 2015. Jefferson, 192 Wn.2d at 249. The modified test asks not whether the party exercising the peremptory challenge engaged in purposeful discrimination, but whether "an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge." Id. This test requires an objective inquiry

[5] The Court of Appeals declined to reach this issue.

based on the average reasonable person with knowledge of implicit bias. Id. An appellate court reviews the record de novo. Id.

No objective observer could view Juror 6's race as the reason for the State's challenge under these circumstances: 1) the prosecutor struck only one of three African-American jurors; 2) Juror 6 declared that she would not be comfortable serving on a jury where a life without parole sentence was possible and "would not be able to make a decision" in such a serious case; 3) she was the only juror that expressed discomfort with life imprisonment; 4) other jurors with significant negative experiences with the criminal justice system were also struck; 5) the trial court vacillated on whether the State's "for cause" challenge should be granted; and 6) both defendants were white.

Peremptory challenges were exercised against two of three African-American potential jurors in this case. RP 1015-16, 1026, 1040. The State exercised a peremptory challenge against Juror 6, who was African-American, and the defense exercised a peremptory challenge against Juror 114, also African-American. RP 1014-16, 1028, 1030. The third African-American, Juror 96, served on the jury. RP 1015, 1026-32, 1040.

The record shows that the State's paramount concern was Juror 6's repeated statements that she could not serve on a jury where a guilty

verdict might result in a life sentence. She told the prosecutor, "I wouldn't feel comfortable also with sending someone to jail for life." RP 827. She stated that, "I don't want to be a part of" such "finite decisions." RP 827. When the prosecutor explained that the jury would not be deciding the punishment, she persisted, stating that, even so, "I don't want that kind of responsibility on my shoulders." RP 828. Indeed, the trial court initially granted the State's "for cause" challenge against Juror 6,[6] and then changed its mind. RP 853-55, 882. Upon further inquiry, Juror 6 reiterated that her concerns were not limited to a death penalty case: "I would fill [sic] extremely conflicted sentencing someone—knowing that my decision could impact somebody being incarcerated for life." RP 874. She persisted that making such a decision "feels wrong to me." RP 875. She explained again, "But knowing that a first-degree murder charge could potentially change somebody's life to that degree, I feel extremely—it's not something I want to do at all. I just don't feel comfortable." RP 875. When asked by the prosecutor whether the potential for a life sentence would be barrier for her to do her job as a juror, she concluded that "I don't know whether that affects my decision-making skills or not." RP 879-80. When finally asked by the trial court

[6] The court concluded that Juror 6 had related that "she could not do her job." RP 854.

whether she could do her job as a juror, she responded "I am not sure." RP 881.

After the "for cause" challenge was denied, the State exercised a peremptory challenge against Juror 6. RP 1014. In responding to the Batson challenge, the State gave three reasons for the peremptory challenge: 1) she could not assure the court that she could do her job as a juror in a first degree murder case, 2) her brother was convicted of attempted murder—a crime very similar to the crime in question, and 3) that she "paused for a very long time" before being able to answer that she could give the State a fair trial, and had strong opinions that the criminal justice system had not treated her brother fairly. RP 1017-20. The trial court allowed the peremptory challenge. RP 1020.

Juror 6's discomfort with serving on a jury when conviction could result in life imprisonment was extremely problematic. Bienhoff's murder conviction was his third strike pursuant to the Persistent Offender Accountability Act. Bienhoff CP 353. Bienhoff wanted the jury to hear that conviction would result in his third strike, so he could argue that he would never have participated in a robbery. Bienhoff CP 363; RP 60-61, 269-73. The trial court denied that motion, but ruled that the defense could offer evidence that Bienhoff was facing a "lengthy sentence." RP 273-74. In addition, when Bienhoff testified his two prior convictions for

robbery and theft were admitted as crimes of dishonesty. RP 3467. Although the court had ruled that Bienhoff's potential life sentence would not be admitted, the ruling could have changed, or Bienhoff could have violated the motion in limine when he testified. After hearing about Bienhoff's two prior convictions, Juror 6 might have inferred that this murder conviction would be his third strike. The risk that Juror 6 would be unable to return a verdict based on her fear that it would result in life imprisonment was very real, and was a legitimate reason to exercise a peremptory challenge having nothing to do with her race. Juror 6's answers were so ambivalent about her ability to serve as a juror in this murder case that the trial court initially granted the State's challenge for cause. RP 853-55. In the end, she could not assure the court that she could do her job as a juror. RP 881. Unless this Court's new standard means that peremptory challenges are never allowed, this Court must acknowledge that there will be valid reasons for exercising a peremptory challenge that fall short of the "for cause" threshold.

There was no disparate questioning of Juror 6, or the other two African-American jurors, one of whom served on the jury. Initially, Juror 6 asked to be questioned outside the presence of the other jurors to express her concerns about serving on a case similar to her brother's. RP 444, 494-98. In other portions of voir dire, the State merely followed up with

Juror 6 based on her responses to general questions as it did with the other jurors, or called on her when she volunteered information and concerns. RP 659-64, 710-31, 825-38. No one who served on the jury expressed any similar discomfort with life sentences.

Another valid concern was Juror 6's opinion that the criminal justice system had not treated her brother fairly, and that this experience would affect her ability to serve as a juror. She candidly discussed her brother's prosecution for attempted murder at age 15, and her opinion that he was not treated fairly. RP 494-98, 659-60, 712-15. While having a close relationship with someone convicted of a crime is a presumptively invalid reason for a peremptory challenge under GR 37(h)(iii), Juror 6 revealed more than a close relationship with someone convicted of a crime. She believed her brother had not been treated fairly by the police or prosecutors,[7] and expressed concern that the experience would affect her ability to be fair. RP 494-98. Juror 6 was not the only juror the State exercised a peremptory challenge against after disclosing a significant negative experience with the criminal justice system, demonstrating that

[7] She stated that her brother was "sometimes" treated fairly by the prosecutors in his case, but that he was not treated fairly by police. RP 712-13. She explained that her brother had been assaulted by the police, had sued the police department and prevailed. RP 659-60.

this reason was not a pretext for discrimination, or evidence of implicit bias.[8]

Finally, while a Batson or GR 37 challenge is available to all litigants, regardless of their race, gender or ethnicity, the respective races of the parties and the prospective jurors appears to be a relevant consideration under a totality of the circumstances inquiry. In numerous cases, this Court has highlighted the defendant's race in analyzing Batson challenges. State v. Rhone, 168 Wn.2d 645, 648, 229 P.3d 752 (2010) (noting that Rhone was African-American); State v. Saintcalle, 178 Wn.2d 34, 309 P.3d 326 (2013) (noting that Saintcalle was African-American); City of Seattle v. Erickson, 188 Wn.2d 721, 723, 398 P.3d 1124 (2017) (noting that Erickson was African-American). Both Bienhoff and Pierce are white, and the victim was African-American. RP 1132; Bienhoff CP 6; Pierce CP 197.

In sum, the totality of the circumstances could not lead an objective observer to conclude that the peremptory challenge to Juror 6 was because of her race. Accordingly, the trial court properly allowed the peremptory challenge.

3. PIERCE'S CHALLENGES TO DELIBERATIONS MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL.

[8] The State also exercised peremptory challenges against Jurors 95 and 108, who had memorable negative experiences with the police. RP 642, 660-61, 664, 1029, 1031.

Pierce contends for the first time on appeal that two errors occurred in regard to deliberations. First, he claims that deliberations began with both alternates and all 12 original jurors in the room on Monday morning. Second, he claims that the trial court erred in not instructing the jury to begin deliberations anew when Juror 5 was replaced with one of the alternate jurors on Monday morning. However, his claims are not supported by the record and thus do not involve manifest errors that may be raised for the first time on appeal.

a. The Record Does Not Support The Claim That Deliberations Began Before The Alternate Juror Replaced Juror 5 At Pierce's Request.

Closing arguments were completed at the end of the day on Thursday, October 29, 2015. RP 3898. The court dismissed the two alternate jurors, told them not to discuss the case with anyone, and instructed the jury that they would receive the exhibits on Monday morning, at which time they could begin deliberations. RP 3898. On Friday, while the jury was in recess, Pierce filed a written motion to disqualify Juror 5 before deliberations began. RP 3900; Pierce CP 167-71. Email correspondence from the court to the parties on Friday morning indicates that the parties agreed to have both alternate jurors report to the jury room on Monday morning and that jurors would be told not to start deliberating. Pierce CP 169. On Monday morning, when proceedings

began at 9:48 a.m., the defendants argued that the trial court should dismiss Juror 5, and both Bienhoff and Pierce argued that dismissal of the juror would not be disruptive because deliberations *had not yet begun*. RP 3900-08. Specifically, counsel for Bienhoff told the court:

> [A]t this point, because *the jury has not started deliberating* and the Court has pretty broad discretion at this point, I think whereas after the jury started deliberating, it would be more problematic.

RP 3901 (emphasis added). See also RP 3908, 3923 (repeatedly affirming that deliberations had not started). Counsel for Pierce agreed:

> And considering that we do have two alternates and *we haven't even started deliberations—they haven't started deliberations*, it just seems like this is the safest, easiest remedy that there is.

RP 3915 (emphasis added). Over the State's objection, the trial court granted the motion to disqualify Juror 5, noting in its ruling that "we haven't even started deliberations." RP 3924. The court seated an alternate juror with the agreement of the parties and instructed the jury "the bailiff will bring you the exhibits and you can *commence* deliberations."[9] RP 3928-29 (emphasis added).

b. Pierce Has Failed To Show Manifest Constitutional Error.

[9] In Bienhoff's opening brief, he agrees that the "record shows the jury began deliberations shortly before 10:40 a.m. on Monday, November 2nd." Brief of Appellant, at 76. Bienhoff cites RP 3937 as the beginning of deliberations, which was after Juror 5 was dismissed and replaced with the alternate. RP 3927-29.

A manifest error requires a plausible showing that the error had practical and identifiable consequences in the trial. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). RAP 2.5(a)(3) requires a "fairly strong likelihood that serious constitutional error occurred." Id.

State v. Jasper, 174 Wn.2d 96, 121, 271 P.3d 876 (2012), is instructive. Jasper claimed that his constitutional rights were violated because the trial court responded to jury inquiries without consulting counsel and in Jasper's absence. The Court of Appeals "assume[d] the facts as urged by Jasper." Id. at 122-23. This Court reversed, holding that the Court of Appeals' assumptions were unwarranted and cautioning that appellate courts "will not, for purposes of reversible error, presume the existence of facts as to which the record is silent." Id. at 124 (quoting Barker v. Weeks, 182 Wash. 384, 391, 47 P.2d 1 (1935)). Appellants bear the burden of demonstrating constitutional error on the record on direct appeal. Jasper, 174 Wn.2d at 124.

The record does not support Pierce's claim that the jury began deliberating prior to the alternate juror being seated, particularly in light of trial counsels' arguments which explicitly and repeatedly asserted that deliberations had not yet begun. There is no evidence that the jury started deliberations without the parties' knowledge and against the court's instructions, and thus there was no need to instruct them to disregard

previous deliberations and start anew. The errors claimed on appeal are not manifest because there is *no* indication that the jury began deliberations prematurely. Pierce's arguments are based on speculation unsupported by the record and may not be raised for the first time on appeal.

D. CONCLUSION

The Court of Appeals' decision finding prosecutorial misconduct during voir dire should be reversed. The claim that the challenge to Juror 6 was improperly granted should be rejected. The claim that the jury began deliberations while both alternates were present and also that the jury was not properly instructed when one of the alternates was seated is not supported by facts in the record and should be rejected as well. The murder convictions of Bienhoff and Pierce should be affirmed.

DATED this 28th day of February, 2019.

Respectfully submitted,

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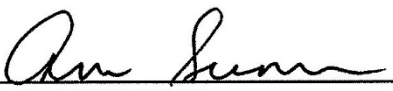
By: 
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